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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1281

HERMAN FRANKS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-6191

MAX BRITTON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-6318

BOYCE MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 74-1281, App. 5a-24a) is reported at 511 F. 2d 25.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1975. The petition for a writ of certiorari in No. 74-1281 was filed on April 11, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. The petition for a writ of certiorari in No. 74-6318 was filed on April 8, 1975, and is therefore also out of time under Rule 22(2) of the Rules of this Court. The petition for a writ of certiorari in No. 74-6191 was timely filed on March 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether tapes of conversations between various persons and an informant, made with the latter's consent, were properly admitted into evidence (raised by all petitioners).

2. Whether voice prints and expert testimony relating thereto and to the contents of the tapes were properly admitted in evidence (raised by petitioners Britton and Mitchell).

3. Whether planning to bomb places of business in part for a private purpose and in part to bring about unionization of employees therein constitutes

a violation of the Hobbs Act (raised by Franks and Britton).

4. Whether the trial court abused its discretion in denying motions for severance (raised by all petitioners).

5. Whether petitioner Franks was prejudiced by the introduction in evidence of false documents compiled to protect a government informer.

6. Whether the co-conspirator exception to the hearsay rule is applicable where the indictment does not charge a conspiracy (raised by Britton).

7. Whether petitioner Britton was entitled to a new trial because of the loss, apparently by court attendants, of two proposed jury instructions which the court rejected.

8. Whether petitioner Mitchell was denied a speedy trial, and whether reversal of his conviction is required by certain other alleged errors.

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioners Franks and Britton were convicted of (a) causing physical violence to two business establishments whose operations affected commerce, in furtherance of a plan to obstruct commerce, in violation of 18 U.S.C. 1951 and 18 U.S.C. 2, (b) aiding and abetting an attempt to destroy the two places of business by means of an explosive, in violation of 18 U.S.C. 844(i) and 18 U.S.C. 2, and (c) interstate transportation of blasting caps, in violation of 18

U.S.C. 842(a)(3)(A). Petitioner Mitchell was convicted of the interstate transportation of blasting caps in violation of 18 U.S.C. 842(a)(3)(A). Franks and Britton received concurrent sentences of ten years' imprisonment on each count. Mitchell was sentenced to imprisonment for eight years. The court of appeals affirmed in a lengthy opinion (Pet. App. 5a-24a).[1]

Since none of the petitioners challenge the sufficiency of the evidence, a detailed recitation of the facts involved is unnecessary.[2] Briefly, the evidence established that petitioners Franks and Britton, who were active members of the Journeymen Barbers International Union in Memphis, Tennessee, caused places of business operated by Charles Holland to be damaged by means of an explosive device.

The bombing of Holland's establishments occurred after Franks and Britton had unsuccessfully attempted to persuade him to operate a union shop and to charge higher rates of tuition at his barber college. Franks arranged for the purchase of dynamite, fuses, and blasting caps and Britton agreed to pay $5,000 to three persons for the bombing of two of Holland's places of business.

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[1] Each of the petitions for certiorari has appended thereto a copy of the court of appeals opinion, the paginations differing. References herein are to the appendix of the Franks petition, designated as "Pet. App.".

[2] A detailed discussion of the evidence is set forth in the government's brief in the court of appeals. A copy of that portion of the brief is being lodged with the Clerk of this Court.

Petitioner Mitchell operated a restaurant in Tunica, Mississippi, and he caused blasting caps used in the bombing to be transported across state lines to Memphis, Tennessee.

ARGUMENT

1. During the investigation, Davis, one of the participants in the bombing, acted as a paid government informant whose conversations with other participants were electronically transmitted to a government vehicle, where they were recorded (Britton Pet. 5).

The contention that recordings of the conversations were admitted in violation of the Fourth Amendment is foreclosed by *United States* v. *White*, 401 U.S. 745, which held that the Fourth Amendment is not violated where one party to the conversation consents to the recording.[3]

Petitioner Mitchell urges, without citation of authority, that Davis' consent to the electronic transmission was "non-existent" because induced by promises of leniency. But consent is not involuntary because it is motivated by personal advantage. See, *e.g.*, *United States* v. *Dowdy*, 479 F. 2d 213, 229 (C.A. 4), certiorari denied, 414 U.S. 823; *United States* v. *Silva*, 449 F. 2d 145 (C.A. 1), certiorari denied, 405 U.S. 918.

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[3] Petitioners' reliance on *Massiah* v. *United States*, 377 U.S. 201, is misplaced. In *Massiah* the electronic transmission occurred after the defendant had been indicted, in violation of his right to counsel under the Sixth Amendment. No such situation is presented here.

2. Petitioners Britton and Mitchell claim that the trial court erred in admitting their voice exemplars in evidence (Britton Pet. 11; Mitchell Pet. 11). This claim is based on the contention that voice exemplars have not been accepted as a reliable identification technique by the scientific community.

While *United States* v. *Addison*, 498 F. 2d 741 (C.A.D.C.), cited by petitioners, held that admission of spectographic analysis of voice exemplars was error (although harmless in circumstances of the case), the court emphasized that it might reach a contrary result in future cases because of the growing acceptance of the technique by the scientific community. Here the court of appeals surveyed the case law concerning this question and found that the trend favored admission of voice prints or exemplars (Pet. App. 15a-16a; see also 49 A.L.R. 3d 915-924).

There is no occasion for review of this evidentiary question by this Court. The admissibility of voice exemplars presents no issue of constitutional magnitude and it is the kind of issue that is properly left to development in the courts of appeals. Cf. *Powell* v. *Texas*, 392 U.S. 514.[4]

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[4] Petitioner Britton's contention (Britton Pet. 8) that the exemplars were admitted not only for identification but also for evidence is incorrect. The exemplars were used solely for identification (Tr. 2223, 2228). To the extent petitioners contend that the order compelling them to give voice prints violated their Fifth Amendment privilege against self-incrimination, it is foreclosed by *United States* v. *Dionisio*, 410 U.S. 1.

Recordings of conversations between petitioners and a government informant were, as shown above, properly ad-

3. Petitioners Franks and Britton, relying on *United States* v. *Enmons*, 410 U.S. 396, contend that since the bombings involved here occurred pursuant to a legitimate union objective—the unionization of the bombed establishments—the Hobbs Act, 18 U.S.C. 1951, is inapplicable. Unlike *Enmons*, which involved violence directed at securing higher wages under an existing collective bargaining relationship, here petitioners sought to compel Holland, the owner of the bombed establishments, to require his employees to join the union.

This was not a legitimate union objective. The union could, of course, have attempted to organize Holland's employees and sought recognition upon a proper showing that a majority of employees desired to be represented by it. But in the absence of such a showing, Holland's recognition of the union would have constituted an interference with his employees' rights, protected by Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. 157, and would have been an unfair labor practice under Section 8 (a)(1) of the Act, 29 U.S.C. 158(a)(1).[5] *Int'l*

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mitted. Petitioners' claim that the district court erred in permitting the government's expert to interpret portions of the recordings is insubstantial. See *United States* v. *Desist*, 384 F. 2d 889, 899 (C.A. 2), affirmed, 394 U.S. 244; cf. *Osborn* v. *United States*, 385 U.S. 323, 333-340.

[5] Moreover, to the extent petitioners sought to compel Holland to agree to either a closed shop, *i.e.*, union membership as a prerequisite to employment, or a so-called "union shop", *i.e.*, union membership required within a stated period from employment, such objectives violated the Tennessee

Ladies' Garment Workers' Union v. *National Labor Relations Board (Bernhard-Altmann)*, 366 U.S. 731, 737-738. Union insistence on such conduct would have also constituted an unfair labor practice. *Bernhard-Altmann, supra; National Labor Relations Board* v. *Local 210 Teamsters*, 330 F. 2d 46, 47 (C.A. 2).

Moreover, the bombings were not motivated solely by union objectives. Petitioner Franks operated a competing business and he had stated that Holland was going to ruin the barber business in Memphis by charging cut-rate prices (Tr. 1107-1108, 1211-1213, 930-933, 938-939).

In any event, there is no need for this Court to consider this issue since petitioners received identical concurrent sentences on the Hobbs Act violation and the violation of 18 U.S.C. 844(i) involving the damaging of property through an explosive device. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

4. Petitioners' various claims concerning joinder and severance were properly rejected by the court of appeals (Pet. App. 7a-11a), on whose opinion in this regard we basically rely. The Hobbs Act charges were properly joined with the charges under 18 U.S.C. 844 since they related to the same transaction—the bombing of Holland's places of business on June 2, 1971.

Petitioner Mitchell's claim that he should have been granted a severance because he was prejudiced by the

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"right to work" laws. See Tenn. Code Ann. §§ 50-208 to 50-210. See generally *Retail Clerks Local 1625* v. *Schermerhorn*, 373 U.S. 746, 375 U.S. 96.

introduction of evidence concerning the bombing is insubstantial. Mitchell was charged only with violation of 18 U.S.C. 842 (interstate transportation of blasting caps), but had this charge been tried separately, evidence concerning the bombings would have been admissible to show intent. See, *e.g.*, *United States* v. *Gimelstob*, 475 F. 2d 157, 160 (C.A. 3), certiorari denied, 414 U.S. 828. Thus, he was not prejudiced by being tried jointly with Franks and Britton.

Petitioners Franks and Britton contend that the trial court erred in refusing to sever their trials from that of Mitchell because they were prejudiced by the introduction of evidence that Mitchell conspired to kill a government witness. But, as the court of appeals held (Pet. App. 10a), there was no prejudice since the "jury could be expected to segregate such evidence and apply it only to Mitchell." See, *e.g.*, *United States* v. *Bell*, 457 F. 2d 1231, 1240 (C.A. 5); *Application of Gottesman*, 332 F. 2d 975 (C.A. 2); *United States* v. *Gimelstob*, *supra*.

5. Petitioner Franks' contention that he was prejudiced by the admission of false documents indicating that he had participated in another bombing of a barbershop is insubstantial (Franks Pet. 7). This contention arises from the following facts: During the investigation of the bombings, government agents became concerned that Davis' cooperation would become known or suspected. Accordingly, a plan to shift suspicion from Davis was devised. Reports containing some false information purportedly furnished

by someone other than Davis, typed on government forms, were furnished Davis and shown by him to petitioners. The false reports were admitted into evidence as a foundation for Davis' testimony concerning the reaction of petitioners when they were shown the reports (Tr. 461, 474-476, 480-485, 496-498, 561-562, 590-592).

The circumstances surrounding the reports were explained to the jury, which was twice instructed that the reports were not admitted for the truth of the matters contained therein (Tr. 478-479, 2504). The court of appeals correctly held (Pet. App. 17a-18a) that, in the circumstances of this case, the admission of the documents was not prejudicial.

6. Petitioner Britton's contention (Britton Pet. 10-11) regarding hearsay evidence is unclear. To the extent he argues that the existence of a conspiracy charge is necessary to sustain the admission of hearsay, his claim is erroneous since such evidence is admissible so long as there is independent evidence that petitioners were part of a joint venture in crime. *United States* v. *Snyder*, 505 F. 2d 595 (C.A. 5), certiorari denied, March 24, 1975 (No. 74-5820); *United States* v. *Perna*, 491 F. 2d 253, 255 (C.A. 6); *Ottomano* v. *United States*, 468 F. 2d 269, 273 (C.A. 1), certiorari denied, 409 U.S. 1128; *United States* v. *Binder*, 453 F. 2d 805, 809 (C.A. 2), certiorari denied, 407 U.S. 920; *United States* v. *Mendell*, 447 F. 2d 639, 642 (C.A. 7), certiorari denied, 404 U.S. 991.

The district court correctly instructed the jury that such evidence could be considered only if it found

that independent evidence established that petitioners were participants in a joint venture in crime (Tr. 3678-3682). This instruction was consistent with the standard that petitioner Britton advocates (Britton Pet. 10-11) and the evidence of his participation in a joint criminal venture was sufficient to permit the admissibility of declarations of co-venturers. See the statement portion of the government's court of appeals brief which has been lodged with the Clerk of this Court.

7. Britton's contention (Britton Pet. 11-12) that his conviction should be reversed because of the loss, apparently by court attendants, of two requested defense instructions that the court refused to give is baseless. Petitioner apparently did not retain a copy of his requested instructions and apparently he does not now recall the content of one of them (Britton Pet. 12). The trial court gave complete and accurate instructions concerning the elements of the offense, burden of proof, and credibility (Tr. 3656-3686). Absent a specific claim of prejudice, petitioner is not entitled to relief.

Petitioner suggests that the second instruction was that a party that calls a witness "vouche[s] for his honesty" (Britton Pet. 12). But even assuming that this was a proper instruction,[*] the trial court did not

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[*] In fact, petitioner's proffered instruction is a formulation of the rule that prohibits a party from impeaching his own witness. It is doubtful that it is a proper jury instruction because, for example, it invites the jury to convict if it finds that a defense witness has committed perjury.

abuse its discretion in rejecting it in favor of the more common standard instructions on credibility (see Tr. 3674-3675, 3684-3685). See *United States* v. *Bayer*, 331 U.S. 532, 536.

8. Mitchell's additional contentions are without merit.

a. Mitchell argues that he was denied his right to a speedy trial (Mitchell Pet. 21-24). Mitchell was indicted and arrested on March 13, 1972, and brought to trial on March 19, 1973. On July 21, 1972, a hearing was held on pre-trial motions that had been filed and the court granted Mitchell's request for the production of transcripts of all conversations recorded by use of electronic surveillance. The transcripts were completed and produced on August 11, 1972.

On September 19, 1972, the government's motion for voice exemplars was granted. Mitchell's appeal from this order was argued on December 18, 1972, and decided adversely to him four days later. Mitchell then refused to comply with the court's order, and was held in civil contempt. His attempted appeal therefrom was dismissed by the court of appeals (Mitchell Pet. 21-22).

The delay in beginning the trial was due to Mitchell's discovery requests and to his efforts to avoid the order compelling production of exemplars. Moreover, Mitchell did not raise the speedy trial claim until the first day of trial (Tr. 15-16), and he has never alleged, and does not now allege, any specific prejudice. Under the principles of *Barker* v. *Wingo*, 407 U.S. 514, there was no denial of a speedy trial.

b. There is no substance to Mitchell's contention (Mitchell Pet. 24-25) that the trial judge should have disqualified himself because he had previously held Mitchell in civil contempt for his refusal to give exemplars. This contention was properly rejected by the court of appeals, on whose opinion in this regard we rely. As the court held (Pet. App. 23a), "there is no showing that Mitchell's attorney of record certified the good faith of Mitchell's affidavit claiming bias and prejudice" as required by 28 U.S.C. 144; and much of the affidavit contains " 'scurrilities and generalities [which] fall far short of the specificities required by statute.' "

c. Venue of the offense, contrary to Mitchell's contention (Mitchell Pet. 28-29), is established by 18 U.S.C. 3237, which provides that transportation in interstate or foreign commerce is a continuing offense that may be prosecuted in any district through which such commerce moves.

d. Mitchell urges reversal of his conviction because a standing order of the district court prohibited questioning of the jurors after verdict without the permission of the trial court (Mitchell Pet. 38). But, as the court of appeals correctly held (Pet. App. 23a), post-verdict interrogation of jurors is subject to the discretionary control of the court. Petitioner has shown no abuse of that discretion.

e. Mitchell's contentions regarding the constitutionality of 18 U.S.C. 842(a)(3)(A) (Mitchell Pet. 25-28) were correctly rejected by the opinion below, on which we rely (Pet. App. 19a-20a):

Mitchell argues that the jury must find that the transporter knew that the interstate transportation violated federal law. By the statute's plain language, however, the violator must "knowingly" transport explosives in interstate commerce; there is no requirement that the violator know that such transportation violates federal statute. Had Congress intended such a requirement, it could easily have imposed one. The judicial imposition of such a requirement would be particularly inappropriate in light of the almost universal lack of such requirement, LaFave & Scott, Criminal Law § 47 (1972), and of Congress' remedial purpose in enacting section 842. See *United States* v. *Dawson*, 467 F.2d 668, 671-673 (8th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973); 116 Cong. Rec. 35298-35361 (1970).

Likewise we reject Mitchell's assertion that there was insufficient evidence that he "caused" the interstate transportation of explosive devices. "Cause," of course, has a broad meaning. See *United States* v. *Hill*, 468 F.2d 899 (5th Cir. 1972); *United States* v. *Boone*, 460 F.2d 1285 (4th Cir. 1972). As long as one puts in motion forces resulting in the interstate transportation of explosive devices, he has "caused" their interstate transportation; surely, one "causes" such interstate transportation by giving such devices to one he knows will cross state lines. [Footnote omitted.]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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JUNE 1975.

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